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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

Number 234

MISSISSIPPI PUBLISHING CORPORATION, Petitioner

vs.

DENNIS MURPHREE, Respondent

BRIEF FOR RESPONDENT

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THE QUESTIONS INVOLVED

The questions presented by this record are:

(a) Was venue properly laid in the Northern District of Mississippi, the residence of the respondent?

This question arises through the ruling of the District Court that, under the Neirbo case (308 U. S. 165, 84 L. Ed. 167), the petitioner, a Delaware corporation, doing business only in the Southern District of Mississippi, where its principal office was located and its agent for service of process resided, was within the meaning of the Federal Venue Statutes, an inhabitant of the Southern

District of Mississippi, and, therefore, under Sec. 52 of the Judicial Code (28 U. S. C. A. Sec. 113), was subject to suit in Mississippi only in that district.

(b) If venue was properly laid in the Northern District, was service of process on petitioner's agent in the Southern District, pursuant to Rule 4(f) Rules of Civil Procedure, sufficient to bring petitioner personally before the court in the Northern District?

POINTS AND AUTHORITIES

POINT I.

VENUE WAS PROPERLY LAID IN THE NORTHERN DISTRICT OF MISSISSIPPI.

1. Jurisdiction was founded solely on diversity of citizenship and the suit was brought in the district of plaintiff's residence.

Judicial Code Sec. 51 (28 U. S. C. A. 112);

McCormick v. Walthers, 134 U. S. 41, 33 L. Ed. 833;

Shaw v. Quincy Mining Co., 145 U. S. 444, 36 L. Ed. 768;

Green v. C. B. & Q. R. R. Co., 205 U. S. 530, 51 L. Ed. 916;

Munter v. Weil Corset Co., 261 U. S. 276, 67 L. Ed. 652;

Seaboard Rice Milling Co. v. C. R. I. & P. R. R. Co., 270 U. S. 363, 70 L. Ed. 633;

Stonite Prod. Co. v. Lloyd, 315 U. S. 561, 86 L. Ed. 1026.

2. The defendant was not a resident of the Southern District of Mississippi within the meaning of Sec. 52 of

the Judicial Code (28 U. S. C. A. Sec. 113), because a corporation can be a resident or inhabitant only of the state in which it has been incorporated.

Shaw v. Quincy Mining Co., 145 U. S. 444, 36 L. Ed. 768;

Galveston H. & S. R. R. Co. v. Gonzales, 151 U. S. 495, 38 L. Ed. 248;

In re: Keasby Milling Co. 160 U. S. 221, 40 L. Ed. 402;

Seaboard Rice Milling Co. v. C. R. I. & P. R. R. Co., 270 U. S. 363, 70 L. Ed. 633;

Neirbo v. Bethlehem Shipbuilding Corp. 308 U. S. 165, 84 L. Ed. 167;

Ward v. Studebaker Sales Co., 113 Fed. (2d) 567.

3. By appointing a resident agent for the service of process pursuant to Mississippi law the defendant waived all requirements as to venue.

Mississippi Code 1942, Sec. 5319;

Sanford v. Dixie Construction Co., 157 Miss. 627, 129 So. 887;

Tri-State Transit Co. v. Mundy, 194 Miss. 714, 12 So. (2d) 920;

Neirbo v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 84 L. Ed. 167;

Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U. S. 4, 84 L. Ed. 537;

Mass. Bonding & Insurance Co. v. Concrete Steel Bridge Co., 37 Fed. (2d) 695 (4th Cir.);

Coastal Club v. Shell Oil Co., 45 Fed. Supp. 859 (D.C. La.);

Barnes v. Wilson & Co., 40 Fed. Supp. 689 (D.C. Wis.);

Williams v. James, 34 Fed. Supp. 61 (D.C. La.).

POINT II.

JURISDICTION OVER THE PERSON OF PETITIONER WAS OBTAINED THROUGH SERVICE OF PROCESS ON ITS AGENT IN THE SOUTHERN DISTRICT OF MISSISSIPPI, PURSUANT TO RULE 4(f) FEDERAL RULES OF CIVIL PROCEDURE.

1. The purpose and intent of Rule 4(f) is to afford a means of serving process in cases similar to that at bar. Rules of Civil Procedure, Rule 4(f);

Proceedings of Washington and New York Institute on Federal Rules, pages 291-292 (Judge Donworth's address);

Moore's Federal Practice, Vol. I, page 361;

Hughes Federal Practice, Vol. 17, page 200, Sec. 18, 992;

2. Rule 4(f) is procedural, and does not extend either the jurisdiction or the venue of the court.

Advisory Committee's report to the Supreme Court April, 1937, note to Rule 4(f);

Hughes Federal Practice, Vol. 17, page 201, Sec. 18, 993;

Moore's Federal Practice, Vol. I, page 360;

Proceedings of Cleveland Institute on the Federal Rules, pages 305-206 (Dean Clark's address);

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359, 71 L. Ed. 684;

Sibback v. Wilson & Co., 312 U. S. 1, 85 L. Ed. 479;

Schwartz v. Artcraft Silk Hosiery Mills, 110 Fed. (2d) 465;

Conracting Division A. C. Horne vs. New York Life Insurance Co., 113 Fed. (2d) 864;

O'Leary v. Lofton, 3 F.R.D. 36 (D.C. N.Y.);

Andrus v. Younger Bros., 49 Fed. Supp. 499 (D.C. La.);

Coastal Club v. Shell Oil Co., 45 Fed. Supp. 859 (D.C. La.);

Totus v. United States, 39 Fed. Supp. 7;

Saivatori v. Miller Music, Inc., 35 Fed. Supp. 45 (D.C. N.Y.);

Williams v. James, 34 Fed. Supp. 61 (D.C. La.);

Zwerling v. New York & Cuba Mail S. S. Co. 33 Fed. Sup. 721 (D.C. N.Y.);

Gibbs v. Emerson Electric Co., 31 Fed. Supp. 983 (D.C. Mo.);

Gibbs v. Emerson Electric Co., 29 Fed. Supp. 810 (D.C. Mo.);

Devier v. George Cole Motor Co., 27 Fed. Supp. 978 (D.C. Va.).

3. By appointing a resident agent for service of process pursuant to the laws of Mississippi, petitioner consented that service upon that agent would confer jurisdiction over its person.

Mississippi Code 1942, Sec. 5319;

Sanford v. Dixie Construction Co. 157 Miss. 627, 128 So. 887;

Tri-State Transit Co. v. Mundy, 194 Miss. 714, 12 So. (2d) 920;

Toland v. Sprague, 12 Peters 300, 9 L. Ed. 1093;

LaFayette Insurance Co. v. French, 18 How. 404, 15 L. Ed. 451;

St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 222;

Mutual Reserve Fund v. Phelps, 190 U. S. 147, 47 L. Ed. 927;

Pennsylvania Fire Insurance Co. v. Gold, 243 U. S. 93, 61 L. Ed. 610;

Hess v. Pawlowski, 274 U. S. 352, 71, L. Ed. 1093;

Smolik v. Philadelphia & Reading Coal & Iron Co., 222 Fed. 148;

Ex Parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853;

Neirbo v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 84 L. Ed. 167;

Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U. S. 4, 84 L. Ed. 537.

POINT III.

RESPONDENT IS A RESIDENT OF THE NORTHERN DISTRICT.

1. The trial court's finding that respondent was a resident of the Northern District was based on substantial evidence and will not be disturbed by this court.

United States v. Chemical Foundation, 272 U. S. 1, 81 L. Ed. 131;

United States v. McGowan, 290 U. S. 592, 78 L. Ed. 522;

Alabama Packing Co. v. Ickes, 302 U. S. 464, 82 L. Ed. 374;

General Talking Picture Corp. v. Western Electric Co., 304 U. S. 175, 82 L. Ed. 1273.

2. The trial court's finding is in accord with applicable decisions of this court and with the applicable statute and decisions of the Supreme Court of Mississippi.

Morris v. Gilmer, 129 U. S. 315, 32 L. Ed. 690;

District of Columbia v. Murphy, 314 U. S. 441, 86 L. Ed. 329;

McHenry v. State, 119 Miss. 289, 80 So. 765;

Clay v. Clay, 134 Miss. 658, 90 So. 181;

Bilbo v. Bilbo, 180 Miss. 536, 177 So. 722;

Smith v. Deere, 195 Miss. 502, 16 So. (2d) 33;

Mississippi Code 1942, Sec. 4055.

ARGUMENT

I.

VENUE WAS PROPERLY LAID IN THE NORTHERN DISTRICT OF MISSISSIPPI, BECAUSE JURISDICTION WAS FOUNDED SOLELY ON DIVERSITY OF CITIZENSHIP AND THE SUIT WAS BROUGHT IN THE DISTRICT OF THE RESIDENCE OF PLAINTIFF.

Prior to 1887 the general venue statute provided that no civil suit could be brought against any person "in any other district than that whereof he is an inhabitant, or in which he shall be found." The Act of 1887 omitted the words "in which he shall be found," and added the presently existing provision that where jurisdiction is founded solely on diversity of citizenship "suit shall be brought only in the district of the residence of either the plaintiff or the defendant." **Judicial Code Sec. 51 (28 U.S.C.A. Sec. 112).**

The meaning and effect of this amendment was discussed by Mr. Justice Gray in **Shaw v. Quincy Mining Co.**, 145 U. S. 444, 36 L. Ed. 768, as follows:

> "The Act of 1887, both in its original form and as corrected in 1888, re-enacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: 'but where the jurisdiction is founded only on the fact that the action is between citizens of different states,

suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' 24 Stat. at L. 552; 25 Stat. at L. 434. As has been adjudged by this court, the last clause is by way of proviso to the next preceding clause, which forbids any suit to be brought in any other district than that whereof the defendant is an inhabitant; and the effect is that 'where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides.' "

. . . . . .

"The statute now in question, as already observed, has repealed the permission to sue a defendant in a district in which he is found, and has peremptorily enacted that 'where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' In a case between natural persons, as has been seen, this clause does not allow the suit to be brought in a state of which neither is a citizen. If Congress, in framing this clause, did not have corporations in mind, there is no reason for giving the clause a looser or broader construction as to artificial persons who were not contemplated, than as to natural persons who were. If, as it is more reasonable to suppose, Congress did have corporations in mind, it must

be presumed also to have had in mind the law, as long and uniformly declared by this court, that, within the meaning of the previous acts of Congress giving jurisdiction of suits between citizens of different states, a corporation could not be considered a citizen or a resident of a State in which it had not been incorporated."

Since the 1887 amendment was adopted, we have found no case wherein the court has held that venue was improperly laid in diversity of citizenship cases where suit was brought in the district of which the plaintiff was a resident. Some of the many cases holding that venue was properly laid in such instances are: **McCormick v. Walthers**, 134 U. S. 41, 33 L. Ed. 833; **Green v. C. B. & Q. R. R. Co.** 205 U. S. 530, 51 L. Ed. 916; **Munter v. Weil Corset Co.**, 261 U. S. 276, 67 L. Ed. 652; **Seaboard Rice Milling Co. v. C. R. I. & P. R. R. Co.**, 270 U. S. 363, 70 L. Ed. 633; **Stonite Prod. Co. v. Lloyd Co.**, 315 U. S. 561, 86 L. Ed. 1026.

Implicit throughout the brief of petition is the vaguely concealed suggestion that in some way the Neirbo decision has changed the rule announced by these cases, at least, in so far as corporate defendants are concerned. The Neirbo case, however, does not disturb those decisions, but in effect, recognizes that no valid question could have been raised as to venue had the suit been brought in the district of the residence of the plaintiff; the first paragraph of the opinion in that case containing this sentence: "The suit was based on diversity of citizenship and was not brought 'in the district of the residence of either the plaintiff or the defendant.'" The lower court in that case ex-

pressly held, and as shown above, the holding to that extent was not disturbed by this court that ". . . had plaintiffs been residents of the Southern District of New York so that venue was properly laid, service of process upon the defendant would have been had by service upon its agent." **Neirbo v. Bethlehem Shipbuilding Corp.**, 103 Fed. (2d) 765, 770.

The ruling of the District Court was anchored on the proposition that the Neirbo case required adoption of the practical and realistic view that for purposes of venue foreign corporations "are domiciled in any district where they do business and have, in accordance with the mandate of state law, appointed agents for the service of process," and, therefore, the defendant within the meaning of Sec. 52 of the Judicial Code (28 U.S.C.A. Sec. 113), was "an inhabitant of the State of Mississippi and entitled to be sued in the District of the State where it resides. (R. p. 33). But it is well recognized that the words "inhabitant" and "resident" as the same are used in Secs. 51 and 52 of the Judicial Code are synonymous with the word "citizen" and all include the idea of domicile. A corporation is not and cannot be a citizen, an inhabitant or resident of a state in which it has not been incorporated. **Shaw v. Quincy Mining Co.**, 145 U. S. 444, 36 L. Ed. 768; **Galveston H. & S. Railway Co. v. Gonzales**, 151 U. S. 495, 38 L. Ed. 248; **In re: Keasby Milling Co.**, 160 U. S. 221, 40 L. Ed. 402; **Seaboard Rice Milling Co. v. C. R. I. & P. R. R. Co.**, 270 U. S. 363, 70 L. Ed. 633.

As we read and understand the Neirbo case, it simply holds that in diversity of citizenship cases the privilege accorded a corporate defendant under the general venue

statute of being sued only in the district of which it is a resident, or in the district of the residence of the plaintiff, may be waived, and is waived where it does business in a foreign state and, pursuant to state law, appoints there an agent for service of process. The opinion in that case does not disturb the well established principle set forth in the cases cited above that within the meaning of the venue statutes "residence," "habitation" and "domicile" are synonymous in their meaning. Instead of disturbing that principle the case impliedly, at least, recognizes its validity; and even those members of the court who constituted the minority did not understand the main opinion to hold otherwise. Thus, in his dissenting opinion, Mr. Justice Roberts, at page 176, said:

> "Whatever may be said in support of the original adoption of a different ruling it has been the law for a century that as respects the jurisdiction of Federal Courts over a corporation in diversity of citizenship cases, the corporation is a citizen and resident of the state of incorporation and no other state. I do not understand the court's opinion to repudiate the rule."

Although it would seem quite clear that the rationale of the Neirbo opinion simply is that by the appointment of an agent for the service of process in a state in which a foreign corporation is doing business, the corporation thereby waives the provisions of the venue statute, which it otherwise would be entitled to assert, and affirmatively consents to be sued in any of the courts of that State, yet a few courts have endeavored to read into the opinion something more than a holding of consent to be sued, and have suggested, as did the District Judge in this case, that

the foreign corporation by consenting to be sued in the courts of a state thereby became a resident of the State within the meaning of the venue statutes. Such was the construction placed upon the Neirbo case in **Moss v. Atlantic Coast Line Railroad Co.**, 149 Fed. (2d) 701 (2nd Circuit), a per curiam opinion, and the same thought was suggested by Mr. Justice Chase, also of the Second Circuit, in **Schwartz v. Artcraft Silk Hosiery Mills**, 110 Fed. (2d) 465. Such a construction arises, we think, from an effort at oversimplification. Many learned writers have suggested that such a holding would have constituted an easy and simple manner of disposing of a very troublesome problem, but they all concede that the Neirbo case was not so decided, and that any decision on such a basis would have to be made at the expense of long settled authority. Thus, in the case of **Ward v. Studebaker Sales Co.**, 113 Fed. (2d) 567, Justice Clark of the Third Circuit, in commenting on the views expressed by various learned writers as to the meaning and effect of the Neirbo case said:

> "It may be observed that the writers above mentioned and their confreres are in hearty accord with the rationale of the Neirbo decision. As one observes, it is a step in the 'process of adjusting outmoded juristic stereotypes to the pragmatic need of exposing these business units to suit.' As all agree, it goes far toward removing the discriminatory advantage heretofore enjoyed by foreign corporations. For 'the effect of the pre-Neirbo rule was usually to provide a dodge for the corporation rather than to insure an appropriate place for trial.' The pundits above quoted from and cited to only regret that the United States Supreme Court did not feel free to go

the whole way in abandoning these 'outmoded juristic stereotypes.' As a writer in the Harvard Law Review puts it:

> "The aura of discredit that surrounds fictional consent, plus the doubts as to the existence of actual waiver on the facts of the Neirbo case and the problematic validity of what results in deprivation by the state of federal venue privileges might persuade an iconoclastic court with a new 'way of looking at corporations' to adopt the more adequate rationale that a corporation established in business within a district is a 'resident' there within the meaning of Section 51. Unlike fictional consent, this construction would dispel any doubts as to its applicability to causes of action arising outside the state. This simplification of the problem would necessarily be at the expense of long-settled authority.' **Venue of Actions Against Foreign Corporations In The Federal Courts** (note), 53 Harvard Law Review 660, 664. If the court had felt so inclined, it might have written finis to the curious legal panorama presented by the attempt to fit the corporate ghost into the less spookish requirements of jurisdiction and venue."

This court has not yet held that a foreign corporation, by qualifying to do business in a state becomes a resident of such state within the meaning of the venue statutes, so as to permit it to be sued only in the district of that state wherein it does business; and we do not think that it will so hold, especially when such a holding would, as in the instant case, have the effect of depriving a citi-

zen of that state of the right which he theretofore had to bring the suit in the district of his residence.

Since Chief Justice Marshall rendered the opinion in **Gracie v. Palmer**, 8 Wheat. 699, 5 L. Ed. 719, it has been consistently held by the Federal Courts that the provisions of the general venue statute fixing the place where suits shall be brought, does no more than accord to the defendant a personal privilege respecting the venue, or place of suit, which he may assert or waive at his election. (See Neirbo case, supra, and discussion of the cases in Mr. Justice Frankfurter's opinion).

After the amendment in 1887, as the same was construed by the Supreme Court in **Shaw v. Quincy Mining Co.**, 145 U. S. 444, 36 L. Ed. 768, and in **Southern P. Co. v. Denton**, 146 U. S. 202, 36 L. Ed. 942, it was generally held that a corporation, by its act in appointing an agent for service of process, could not be held to have waived its right to be sued only in the district of which it was an inhabitant, or in the district of which the plaintiff was a resident; and, therefore, over its objection, it could not be subjected to suit in a Federal Court in any other district in which it did business or had appointed an agent for the service of process. This rule was in effect in the Fifth Circuit up until the Neirbo case was decided. **McLean v. Mississippi**, 96 Fed. (2d) 741, 119 A.L.R. 670.

The Neirbo case liberalized and broadened the legal concept of waiver. By appointing a process agent in a state foreign corporations agree affirmatively that service of process on that agent would confer jurisdiction over their person. But the waiver of venue comes about, not

by actual consent, but by fictional consent. So the case held that when a foreign corporation qualified to do business in a state, and in accordance with the laws of that state appointed an agent for the service of process, it not only consented the service of process on its agent gave jurisdiction over its person, but it also thereby waived the provisions of the venue statute which it otherwise would be entitled to assert and affirmatively consented to be sued in that state,—not only in the state courts but in the federal courts sitting therein, and not only by residents of the state, but by non-residents as well.

The Mississippi Statute provides that every foreign corporation doing business in the state shall appoint a resident agent upon whom service of process may be had in any suit against the corporation. (Sec. 5319 Code 1942, Appendix A p. 49 infra). It was in obedience to the mandate of this statute that defendant appointed its resident agent for service of process.

The Supreme Court of Mississippi has construed this statute as making the agent thus appointed, regardless of his actual residence or domicile, an agent for the service of process in any suit brought against the corporation in any county of the state, so that process may issue from the county in which the suit is brought, be served upon the resident agent in the county of his residence, and thereby the court obtains jurisdiction over the person of the defendant corporation. In other words, so far as the effectiveness of service of process is concerned the residence of the agent in contemplation of law, is in every county in the state. **Sanford v. Dixie Const. Co.**, 157 Miss. 627, 128 So. 887.

In the Sanford case suit was filed in Forrest County and process served on the resident agent of the defendant foreign corporation in Harrison County where the agent resided, and there it was held that the Circuit Court of Forrest County had jurisdiction of the suit and of the person of the defendant. In construing the statute the court remarked that where, pursuant to its provisions a foreign corporation has duly designated a resident agent, "process may be served in the same way and as easily and as certainly and with as full and complete effect as upon a like agent of a domestic corporation;" (opinion p. 632) and the court then held that by this statute "it was the intention and it has the effect when a foreign private corporation has complied with it, to place the foreign private corporation in regard to venue in transitory actions in exactly the same attitude as a domestic corporation, and that its effect is to domesticate the said foreign private corporation for the purposes of suit and process—although for that purpose only." (Op. pp. 634-635).

And, accordingly, the Supreme Court of Mississippi in a later case held, that venue being properly laid in accordance with the State Statute, service of process on the resident agent of the foreign corporation in the county of his residence was valid, and the court acquired jurisdiction both of the subject matter and of the person of the defendant, even though the cause of action arose outside of the State of Mississippi. **Tri-State Transit Co. v. Mundy**, 194 Miss. 714, 12 So. (2d) 920.

The contract thus made between petitioner and the State of Mississippi, whereby it appointed a process agent, and in consideration of the protection given it by the state,

consented to be sued therein, was a real contract, and the consent thus given extended to any court sitting in the state which applies the laws of the state, which included the District Court of the United States for the Northern District of Mississippi. **Neirbo v. Bethlehem Shipbuilding Corp.**, 308 U. S. 165, 84 L. Ed. 167; **Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.**, 309 U. S. 4, 84 L. Ed. 537; **Mass. Bonding & Ins. Co. v. Concrete Steel Bridge Co.**, 37 Fed. (2d) 695 (4th Cir.); **Coastal Club v. Shell Oil Co.**, 45 Fed. Supp. 859, (D.C. La. 1942); **Barnes v. Wilson**, 40 Fed. Supp. 689 (D.C. Wis. 1941); **Williams v. James, etc.**, 34 Fed. Supp. 61 (D.C. La. 1940).

From the cases cited by petitioner it would appear that the argument is directed, not so much to the proposition that venue was improperly laid in this case, but rather to the proposition that the court had no jurisdiction over petitioner's person. With this in mind, consider the situation prior to the adoption of the Federal Rules of Civil Procedure, particularly in those cases where resident agents for the service of process had not been appointed. Under Sec. 51 of the Judicial Code, a plaintiff in cases where jurisdiction was dependent upon diversity of citizenship had the choice, as of right, to sue either in the district where he lived or in the district where the corporation was domiciled. But this choice was more fanciful than real. In practice the choice could be exercised and the plaintiff could sue in the district of his residence only if the corporation was doing business there and had an agent there upon whom process could be served. This was not because of any want of proper venue, but by reason of inability to acquire jurisdiction over the person of the defendant, because process could not run beyond the

boundaries of the district, and because process could not lawfully be served upon an agent of the corporation who might be found within the district unless the corporation was actually doing business there. Thus, in **Munter v. Weil Corset Co.**, 261 U. S. 276, 67 L. Ed. 652, a citizen of Connecticut filed suit in a district court of that state against a citizen of New York who was served with process in New York. This court held that venue was proper but that jurisdiction over the person of the defendant was not had because the process could not run beyond the boundaries of the district. And, in **Green v. C. B. & Q. R. R. Co.**, 205 U. S. 530, 51 L. Ed. 916, the plaintiff, a citizen of Pennsylvania, brought suit in a federal court in that state against the Railroad Company, an Iowa corporation, and the service of the process was had upon an agent of the Railroad Company in that district. This court held that venue was properly laid because the suit was brought in the district of plaintiff's residence, but that jurisdiction was not had over the person of the defendant, because it was not doing business in the District where the suit was filed. Other cases, myriad in number, announce the same principle and will be found cited in the petitioner's brief.

The discriminatory advantages thus enjoyed by foreign corporations were to a very large extent removed, and the evils arising thereby, to a large extent corrected, by the adoption of the Federal Rules of Civil Procedure, and were still further removed and corrected by the decision in the Neirbo case. One of the main purposes of Rule 4(f) of the Rules of Federal Procedure was to reach a situation precisely as that which is presented in this case. Thus, Judge Donworth of the Advisory Committee at the

New York Institute of Federal Rules explained its purposes, as follows:

> "Rule 4(f) enlarged to some extent the former statutory rule. All process, other than subpoena, may be served anywhere within the territorial limits of the state in which the district court is held. For instance, you are a citizen of New York, residing in New York City, and you wish to sue a New Jersey corporation. That New Jersey corporation is doing business in Buffalo and it has an agent there but no agent in the Southern District of New York. You cannot sue that defendant in the Western District without its consent, because that district is not the residence of either the plaintiff or the defendant. Under this Rule 4(f) you may sue that corporation in the Southern District of New York and you may serve the agent in Buffalo. That does not extend the jurisdiction of this court at all, for the District Court for the Southern District always had jurisdiction, but until this rule became effective, you could not serve the summons in another district of this State. You would have to wait until the defendant corporation was found to have a properly authorized agent in this district." Proceedings of Washington and New York Institute on Federal Rules pp. 291-292.

It is to be noted that in the numerous cases cited by petitioner, holding that unless a foreign corporation was actually doing business in the State where suit was brought, service of process was not effective to confer jurisdiction over the person of the corporation, (**St. Louis and S. W. R. R. Co. v. Alexander**, 227 U. S. 218, 57 L. Ed. 468, and

Green v. C. B. & Q. R. R. Co., 205 U. S. 530, 51 L. Ed. 916 are examples) the corporation had not qualified to do business in the state and had not appointed an agent upon whom service of process might be had in suits brought against it. In the Neirbo case, the court held that by so doing the corporation consented to be sued, and by such consent also waived venue. This was not an actual waiver of venue, but a constructive consent which the court found to follow as a legal incident to the corporation's qualification to do business and its appointment of a process agent. How then can it be doubted that the district court in this case acquired jurisdiction over the person of the petitioner through service of process on its agent, when as to that matter it was not necessary to rely upon constructive or fictional consent, for the petitioner by its very act in appointing a process agent had affirmatively consented that service of process upon that agent should be effective to confer jurisdiction upon its person in any suit which might be brought within the state?

In the case of **Williams v. James, et al,** 34 Fed. Supp. 61 (D.C. La. 1940), the court discussed the effect of the Neirbo case in connection with the Louisiana statute providing for the appointment by foreign corporations of process agents, particularly in respect to the matter of acquiring jurisdiction over the person of the corporation through the service of process on its agent in a district other than that in which the suit was filed, and in the opinion at page 68 Judge Porterie said:

> "Service on the Secretary of State is good service on the defendants, and brings their persons into the western district which has venue of the subject, be-

cause of the statute-contract each has agreed to be everywhere in the state. The Neirbo doctrine applied to the instant case places the person of each of the two defendants all over the state; provisions of law as to jurisdiction of person have been waived. The service on the physical person of the Secretary of State is only necessary because he is the one to send notice to the defendant—all of which has been done by the election and is for the convenience of the defendant."

In **Coastal Club v. Shell Oil Co.**, 45 Fed. Supp. 859 (D. C. La. 1942), the court in discussing the same problem said:

"The plaintiff has residence in this district; in the Neirbo case, supra, suit was not brought 'in the district of the residence of either the plaintiff or the defendant.' Granting that Judicial Code, Section 51, 28 U.S.C.A. s. 112, has been interpreted by the courts to mean that suit may be brought in the district of the residence of the plaintiff, if the defendant be found therein and served with process (**Gutschalk v. Peck** D.C. 261 F. 212; **O'Neil v. Cooperative League of America**, D. C., 278 F. 737; **Hughes Federal Procedure, Hornbook Series**, 2nd Ed. 1913, §104, p. 264; **Simpkins Federal Practice**, Revised Ed. 1923, p. 350) a long and well established rule—we are of the opinion that under the statute-contract, statewide in effect, the defendant is found in this district. And this last conclusion we take from the Neirbo doctrine."

In the instant case it is not necessary that resort to the Neirbo decision be had in order to reach the conclusion

which Judge Porterie reached in the two cases cited above. That the statute-contract is state-wide in effect and that, so far as the effectiveness of service of process is concerned, the residence of the agent is in every county in the state so that service of process upon him wherever he resides, gives jurisdiction over the person of the corporation is settled by the decisions of the Supreme Court of Mississippi hereinbefore referred to and discussed.

Under petitioner's Point IV it is argued that the consent to be sued, which flows from the appointment of a resident agent for service of process, is circumscribed and limited by the provisions of the State Venue Statute; and accordingly that this suit could be maintained only in a United States District Court which embraces a county in which venue would be proper had the suit been brought in the state court. This point was elaborately presented and argued in the Circuit Court of Appeals and was there summarily disposed of by the remark that "it is Hornbook law that where a Federal Statute fixes the venue of the Federal Courts, state laws are not applicable." (T. p. 56).

To support the novel argument thus made by petitioner a number of cases are cited, none of which are in point. The idea apparently springs from a misconception of the **Nierbo** and **Oklahoma Gas Co.** decisions, and particularly from a misconception of the meaning of a quotation from **Cohen v. American Window Glass Co.**, 126 Fed. (2d) 111, (Brief p. 67) in which Judge Clark refers to the "trend toward allowing state laws to govern jurisdiction and venue over foreign corporations." This same thought is expressed by a writer in the Harvard Law Review, in which he speaks of "deprivation by the state of

federal venue privileges." (Venue of actions against Foreign Corp. in the Federal Court, 53 Harvard Law Review 660, 664). But a reading of that opinion will show that Judge Clark did not mean that the trend was toward allowing state law to govern jurisdiction and venue in Federal Courts in the sense that the state venue statute would control to the exclusion of the federal venue statute, but rather in the sense that compliance with a state statute requiring the appointment of a resident agent for the service of process constituted a waiver by the corporation of federal venue privileges; and to that extent the state statute affected jurisdiction and venue. Both Judge Clark and the writer in the Harvard Law Review had in mind the same thing, namely, that the Neirbo case extended and broadened the doctrine of jurisdiction-by-implied-consent.

In **Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.**, 100 Fed. (2d) 770 the suit was brought in a district embracing a county in which suit could have been brought under the state law, but that circumstance did not, in any wise influence the decision. Thus, this court in its opinion said:

> "Prior to this suit, Wilson & Co. had, agreeable to the laws of Oklahoma, designated an agent for service of process 'in any action in the State of Oklahoma.' Both courts below found this to be in fact a consent on Wilson & Co.'s part to be sued in the courts of Oklahoma upon causes of action arising in that state. The Federal District Court is, we hold, a court of Oklahoma within the scope of consent, and for the reasons indicated in Neirbo v. Bethlehem Shipbuilding Corporation decided Nov. 22, 1939, 308 U. S. 165, 84

L. Ed. 167, 60 S. Ct. 153, Wilson & Co. was amenable to suit in the Western District of Oklahoma." (**Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.**, 309 U. S. 4, 84 L. Ed. 537, 539).

In **Dehne v. Hillman Investment Co.**, 110 Fed. (2d) 456 (Cir. 3), and in **Ward v. Studebaker Sales Corp.**, 113 Fed. (2d) 567 (Cir. 3), it was held that the appointment of a resident agent for the service of process pursuant to the laws of Pennsylvania constituted, under the doctrine of the Neirbo case, a waiver of the corporation's privilege under the Federal Venue Statute of being sued only in the district of which it was an inhabitant. Nothing in either of those decisions suggested that the implied consent which arose from the appointment of such agent for service of process was limited or circumscribed by the State Venue Statute.

An acceptance of petitioner's theory would mean that by some alchemy "waiver of privilege" is transmuted into "acquisition of right." But waiver connotes the surrender of a right or privilege, not its acquirement. Each is the antithesis of the other. The argument would be perhaps more plausible if the respondent were a non-resident of the State of Mississippi; but as applied to the facts in the case at bar, acceptance of such a theory would mean that by consenting to be sued in the district where it does business, petitioner thereby not only acquired the right not to be sued elsewhere in the state, a right which it theretofore did not have; but also deprived the respondent of a right which he theretofore did have, namely, the right under the Federal Venue Statute of bringing the suit in the district of his residence. Petitioner's theory finds no

support in any of the reported cases; it has no logical basis, and we do not think it will be accepted by this court.

II.

JURISDICTION OVER THE PERSON OF PETITIONER WAS OBTAINED THROUGH SERVICE OF PROCESS ON ITS AGENT IN THE SOUTHERN DISTRICT PURSUANT TO RULE 4(f) FEDERAL RULES OF CIVIL PROCEDURE.

Process was issued by the Clerk of the Northern District, directed to the marshal of the Southern District, and by him was served upon H. V. Watkins, Jr., a resident of the Southern District, who pursuant to the provisions of the Mississippi law had been appointed agent of the petitioner for receiving service of process. The issuance and service of process was pursuant to the provisions of Rule 4(f) of the Federal Rules of Civil Procedure, and was regular in every respect; and unless by this method of service the general jurisdiction or the venue of the court was extended, or unless the Rule itself was beyond the ambit of this court's authority, as measured by the Act of Congress delegating to it the power to prescribe the rules, then jurisdiction over petitioner's person was had thereby.

We think it cannot be questioned that the intent of the Rule was to reach just such a case as is here presented. Its clear and unmistakable wording shows this to be true. The illustrative example given by Judge Donworth of the Advisory Committee, in his address at the New York and Washington Institute on the Rules (quoted supra p. 20) in all its essential particulars, is identical with the case

at bar. Judge Donworth's conception of the purpose and meaning of the rule is shared by learned text writers on the subject. Thus, in Moore's Federal Practice, Vol. 1, page 361, it is said:

> "Rule 4(f) removes the difficulties surrounding the service of process in actions brought in a district court held in a state containing more than one district. Rule 4 (f), as pointed out in the discussion of Rule 4(d) (1) and Rule 4(d) (3), is aimed chiefly at cases where a statutory agent is designated by state law to receive service of process for foreign corporations, and nonresident individuals, such as nonresident motorists and nonresident sellers of securities. Prior to the adoption of Rule 4(f) the situation in states with two or more districts was substantially as follows: There are two districts, A and B. The plaintiff resides in A and the statutory agent resides in B. Under the state law the action may be instituted in the state court and service of process validly effected by serving the agent anywhere within the state. The state statute, which designates a person as a statutory agent upon whom service of process can be made, is applicable in the federal courts; but not the state statute which allows process to run throughout the state. If the plaintiff instituted his action in district B, no difficulty as to service beyond the district was encountered, but the venue was wrong since neither the plaintiff nor the defendant resided in that district. If the action was instituted in district A, the venue was proper, but service had to be made beyond the district unless the agent happened to be found within the district. The cases of the lower federal courts were con-

flicting. At least one case held that service of process issuing out of the district court of A could be validly made in B, holding that the defendant is deemed to have consented, or at least cannot be heard to object, to service upon the agent anywhere within the state. Several other cases, however, refused to adopt that view and held that process issuing out of the district court of A could not be validly served in B, while a few other cases held the service invalid because made by the marshal of A, who was held to have no authority to make service outside of A. Rule 4(f) removes the difficulty as to the validity of service outside the district but within the state and coupled with Rule 4(c) and §503, 28 U.S.C.A. which permit the marshal of either district to make valid service, prevents any question arising as to whether the proper marshal served the process."

In Hughes Federal Practice Vol. 17, page 200, Sec. 18, 992, the author says:

"Formerly, process could be served only within the district of which it was issued, unless there was some form of statutory authorization for other service outside of the district and then such service could be made only by the marshal of the district in which service was to be made. This led to many difficult problems, particularly where the plaintiff resided in one district in a state and desired to sue a non-resident having an agent for the purpose of suit in another district of the state. If suit was brought in the district in which the agent resided, where service could validly be made, there was not proper venue, since

neither the plaintiff nor the defendant resided there, although the defendant's agent lived there; but if suit were brought in the district where the plaintiff lived, the venue was proper but there could not be effective service on the defendant or the defendant's agent. By the change in practice effected by Rule 4(f), this difficulty is overcome."

The purpose of the rule, then, being clear, does it extend either the jurisdiction or the venue of the District Court, or does it affect substantive rights rather than matters of procedure? We think not.

In many instances the Federal Statutes provide for service of process beyond the boundaries of the state, or within the state, but beyond the boundaries of the district. (See Advisory Committee notes to Rules 4(e), 4(f)). District courts also have the power (28 U.S.C.A. Sec. 654) to issue subpoenas for witnesses in criminal cases to be served anywhere throughout the country. But, it has never been suggested that the right thus given by statute to have process run beyond the boundaries of the district, and even beyond the boundaries of the state in any wise added to the jurisdiction of the district courts, so as to make the practice contrary to the doctrine of territorial limitations announced in **Toland v. Sprague**, 12 Peters 300, 9 L. Ed. 1093, and other cases following it. Thus, in **Eastman Kodak Co. v. Southern Photo Materials Co.**, 273 U. S. 359, 71 L. Ed. 684, 689, the court said:

"That Congress may, in the exercise of its legislative discretion fix the venue of a civil action in a federal court in one district, and authorize the process to

be issued to another district in which the defendant resides or is found, is not open to question."

The Act of Congress authorizing promulgation of the Rules of Civil Procedure provided that the Supreme Court should prescribe by such rules the practice and procedure in civil actions at law, but that they should "neither abridge, enlarge nor modify the substantive rights of any litigant." (28 U.S.C.A. Sec. 723 (b)). In **Sibbick v. Wilson & Co.**, 312 U. S. 1, 85 L. Ed. 479, this court had under consideration the validity of Rules 35 and 37 which provided for the physical and mental examination of litigants. It was held that these rules did not nullify, or infringe upon any substantive right of the parties, but in fact were procedural only, and, therefore, were within the power delegated to the Supreme Court by Congress:

> "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States; but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose." (Op. p. 10).
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> . . . . . .
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> "In the instant case we have a rule which, if within the power delegated to this court, has the force of a federal statute." (Op. p. 13).
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> . . . . . .
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> "The test must be whether a rule really regulates procedure,—the judicial process for enforcing

rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules in question are such is admitted." (Op. p. 14).

. . . . . .

"The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose. Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and defended before the committee of the two Houses. The Preliminary Draft of the rules called attention to the contrary practice indicated by the Bostford Case, as did the Report of the Advisory Committee, and the Notes prepared by the Committee to accompany the final version of the rules. That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found. We conclude that the rules under attack are within the authority granted." (Op. pp. 14-15).

It is also to be noted that the Advisory Committee's report to the Supreme Court of April, 1937, in the note to Rule 4(f) raised the question whether this Rule might not extend the jurisdiction or venue of the District Court, but nevertheless the Rule was adopted without change. Text writers, and other students of the subject have noticed and discussed the question and seem agreed that the rule is

procedural and does not enlarge either jurisdiction or venue. Thus, in Hughes Federal Practice, Vol. 17, Sec. 18993, the author says:

> "The question has been raised by some writers as to whether this provision of Rule 4 does not go beyond the procedural limits of the Enabling Act. The argument made on this question is that by extending the limits within which service may be made, the rule extends the power of the District Court and enables it to bring before it defendants who could not otherwise be served. However, the Advisory Committee expressly raised this question in a note to the Supreme Court and, since the rule was adopted in the form in which the Committee had submitted it, it may be presumed that the court felt that there was no merit to the objection.
>
> "In this connection it is interesting to note the statement of Dean Clark, Reporter to the Advisory Commitee, that the rules make a distinction between 'the persons who may be served with process and the question of venue or jurisdiction' so that the plaintiff must still decide in which District Court he will bring his action, if he has a choice by reason of some statute allowing suit to be brought in the district of the defendant's residence or in the district where he does business. Dean Clark then added:
>
> "' if, under the rules of venue, suit may be brought in the district court, then it is possible that there may be a slight extension of the persons who may be summoned in the action, but this is only on the question of service of process. * * * *

"'Perhaps I might add this, that some people have argued that venue is a broad enough term to include this matter of service of process. I suppose there is a possibility of argument that it conceivably might be so held, but we do not think that is the case. We are of the opinion that venue does not include this matter of service of process.'

"The lower Federal Courts are not in harmony on the question, but on the whole the views expressed by Dean Clark seem sound, and there is no extension of jurisdiction or venue."

Professor Moore in his splendid treatise on the Rules, Vol. I, page 360, used similar language saying:

"Except when otherwise provided by a federal statute, service of process of each district court generally was valid only when served within the district. Rule 4(f) in extending the authority to serve the process of a district court beyond the district but within the territorial limits of the state in which it is held is not a very extensive change except in the case of the summons. While the rule is clearly desirable, some lawyers, as pointed out by the Advisory Committee, have questioned the power of the court to promulgate this rule. The rule in no way alters venue requirements; nor does it enlarge the district court's jurisdiction over the subject matter. It does permit a district court to gain personal jurisdiction over a defendant in situations where it could not have done so prior to the adoption of the Federal Rules. Since the Advisory Committee specifically called the atten-

tion of the Supreme Court to the question of its power to promulgate this rule, it may be safely assumed that the Supreme Court, by promulgating the rule, has concluded that it has the power."

This quotation makes it clear that Rule 82, providing that nothing in the Rules should be construed to extend or limit the jurisdiction of the district courts has application to jurisdiction of the subject matter of those courts, rather than jurisdiction over the person of the parties litigant therein. Dean Clark, Reporter for the Advisory Committee, also stressed this same point in his address before the Cleveland Institute on the Rules, saying:

"The question has been raised whether this is not a substantive change, one affecting jurisdiction and venue. I might say on that, it is our theory that definitely it is not. This is not a matter of either the jurisdiction of the court, what matters the court shall hear and decide, or of the venue, which is the place where certain kinds of action shall be tried. This affects neither one of those points. It simply says that in cases where the district court already has jurisdiction and venue its process may reach as far as the confines of that state itself. In other words, that is why we consider it procedural. It is simply allowing people to be brought before the court within the entire state and not merely within one District." Proceedings from the Cleveland Institute on the Federal Rules (1938) 205-206.

In **Williams v. James** (D. C. La.) 34 Fed. Supp. p. 61 Judge Porterie said:

"Objections to the validity of Rule 4(f) were specifically presented to the Supreme Court of the United States: that it enlarged the jurisdiction. See the Report of the Advisory Committee (April, 1937) 14: 'Some members of the bar question the power of the Court to make this extension.' Yet the Supreme Court of the United States left Rule 4(f) untouched. After the Rules were promulgated and reported by the Court to the Congress, the Congress adopted them intact. This, we say, was a congressional sanction of enactment.

" 'This story of the birth of Rule 4(f) is given far-reaching significance and great value by the case of Sibback v. Wilson & Co., (C.C.A. 7th, 1939) 108 F. (2d) 415 (rev'd on other grounds (1941) 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479), wherein Rule 35(a), having been adopted in like circumstances as Rule 4(f), was declared to be a legislative enactment—the equivalent of a statute of Congress. The case holds these facts of preparation, promulgation and enactment, and, particularly, with Rule 82 providing that jurisdiction and venue shall remain unaffected, to prove that both Congress and the Supreme Court interpreted Rule 35(a) as not abridging substantive rights. Likewise, therefore Rule 4(f) is not an abridgement of substantive rights.' "

The decisions of the district courts are in conflict on the question whether, in the situation here presented, service of process pursuant to Rule 4(f) is effective to confer on the court personal jurisdiction over the defendant. The following district court decisions are in accord with the

decision of the Circuit Court of Appeals in this case. **Devier v. George Cole Motor Co.**, 27 Fed. Supp. 978 (D.C. Va.); **Gibbs v. Emerson Elec. Co.**, 29 Fed. Supp. 810 (D.C. Mo.); **Gibbs v. Emerson Elec. Co.**, 31 Fed. Supp. 983 (D.C. Mo.); **Zwerling v. New York & Cuba Mail S. S. Co.** 33 Fed. Supp. 721 (D.C. N.Y.); **Williams v. James**, 34 Fed. Supp. 61 (D.C. La.); **Salvatori v. Miller Music, Inc.**, 35 Fed. Supp. 845 (D. C. N.Y.); **Totus v. United States**, 39 Fed. Supp. 7 (D.C. Wash); **Coastal Club v. Shell Oil Co.**, 45 Fed. Supp. 859 (D. C. La.); **Andrus v. Younger Bros.**, 49 Fed. Supp. 499 (D. C. La.) and **O'Leary v. Lofton**, 3 F.R.D. 36 (D.C. N.Y.). The following District Court cases take the contrary view:

Melekov v. Collins, 30 Fed. Supp. 158 (D.C. Calif.); **Carby v. Greco**, 31 Fed. Supp. 251 (D.C. Ky.); **Richards v. Franklin County Distilling Co.**, 38 Fed. Supp. 513 (D.C. Ky.).

The only Circuit Court of Appeals decision directly in point is **Schwartz v. Artcraft Silk Hosiery Mills**, 110 Fed. (2d) 465 (2nd Cir.), and it is in accord with the decision rendered by the Circuit Court of Appeals in this case. Petitioner, however, cites **Sewchulis v. Lehigh Valley Coal Co.**, 233 Fed. 422, and **Contracting Division A. C. Horne v. New York Life Insurance Co.**, 113 Fed (2d) 864, both of which are also from the Second Circuit. The Sewchulis case was decided prior to the adoption of the Federal Rules of Civil Procedure. The Contracting Division case involved the question of venue in a patent infringement suit, wherein one of the parties was served with process in another district of the same state. No point was made that jurisdiction of the person was not acquired by this service, and such apparently was conceded; but the court held that the

venue statute governing patent cases did not permit the suit to be proceeded with against that defendant, venue in such cases being limited to the district of defendants residence, or where the patent was infringed, and the defendant had an established place of business. By implication, at least, the case supports the decision of the Circuit Court of Appeals in this case. Certainly there is nothing to indicate a ruling at variance with that expressed in **Schwartz v. Artcraft Silk Hosiery Mills**, supra, decided by the same Circuit less than five months previous thereto.

Petitioner relies mainly upon **Carby v. Greco**, 31 Fed. Supp. 251, and **Richards v. Franklin County Distilling Co.**, 38 Fed. Supp. 513, both from the Western District of Kentucky and decided by Judge Miller. In **Carby v. Greco** suit was filed in the District Court for the Western District of Kentucky, plaintiff's residence, against two individuals who were citizens of Alabama. Process was served upon the Secretary of State, a resident of the Eastern District, who pursuant to the Kentucky Statute was made agent for the service of process in suits against non-residents involved in motor vehicle accidents occurring within Kentucky. The court held that the District Court had jurisdiction over the subject matter and that venue was proper, but that no jurisdiction was acquired over the person of the defendants. The holding of lack of personal jurisdiction was based on the theory that such service under Rule 4(f) extended the jurisdiction of the court contrary to the doctrine announced in **Toland v. Sprague**, and thereby infringed upon substantive rights of the defendants. It is obvious that Judge Miller construed the words "jurisdiction of the district court" contained in Rule 82, as embodying jurisdiction of the person as well as jurisdiction of

the subject matter, and thereby reached the erroneous conclusion that Rule 4(f) as applied to the facts in that case affected substantive rather than procedural matters.

When **Richards v. Franklin County Distilling Co.** was decided this court had rendered its opinion in **Sibback v. Wilson & Co.**, 312 U. S. [redacted], 85 L. Ed. 479. That decision shook Judge Miller's confidence as to the correctness of his decision in **Carby v. Greco**, but not sufficiently to cause him to depart therefrom. Thus, he says (p. 515):

> "Plaintiff urges upon the court that its previous ruling in the Carby case should be reconsidered and revised, in light of the more recent opinion of the Supreme Court in Sibback v. Wilson & Co., 61 S. Ct. 422, 85 L. Ed.—decided January 13, 1941. That case had under consideration the validity of another rule and is in point only in so far as it holds that the Federal Rules of Civil Procedure, including Rule 4(f), have the force and effect of a statutory enactment. Plaintiff therefore contends that Rule 4(f) is a statutory enactment and therefore supersedes the earlier rule established by the case above referred to. I agree that Rule 4(f) has the effect of a statutory enactment, but this also means that Rule 82 likewise has the effect of a statutory enactment. Accordingly, the question still remains for decision as to the combined effect of both Rules 4(f) and 82. This question will no doubt repeat itself often and it is hoped that it will be ruled upon by one of the higher courts in the near future, as it should be applied uniformly throughout the federal courts. In the absence of any such ruling at the present time, and in view of conflicting decisions from Dis-

trict Courts, I see no reason to depart from my former holding in Carby v. Greco, supra."

In any event, however, Judge Miller did not decide **Richard v. Franklin County Distilling Co.**, on the ground that service of process upon the co-defendant in an adjoining district was insufficient to bring the person of that defendant before the court, but the decision was based squarely on the proposition that such defendant was not subject to suit in the Western District because venue as to it was absent; saying that "the right of a defendant to object to the venue or place of trial is not affected by the fact that the co-defendant is properly before the court," and, therefore, since venue was absent the case could not be proceeded with as to that defendant. Compare **Neirbo v. Bethlehem Shipbuilding Corp.** 308 U. S. 165, 84 L. Ed. 167.

Service of process upon the petitioner in the instant case did not enlarge either the jurisdiction or the venue of the court; nor were any substantive rights of petitioner infringed upon. Jurisdiction was present because of diversity of citizenship of the parties; and venue was present because the suit was brought in the district court of the residence of the plaintiff. Petitioner admittedly was doing business in the State of Mississippi and had appointed a resident agent there for the service of process. Under the decisions of the Mississippi Supreme Court, the residence of the agent, in contemplation of law, was in every county in the state, and the corporation, for the purpose of suit and process was in exactly the same attitude as a domestic corporation. **Sanford v. Dixie Const. Co.**, 157 Miss. 627, 128 So. 887. By such appointment the corporation expressly consented that service of process upon its agent would give

the court jurisdiction over its person. As was said by Mr. Justice Frankfurter in the Neirbo case, quoting from the opinion of Judge Cardoza construing the New York Statute, the contract "means that whenever jurisdiction of the subject matter is present, service on the agent shall give jurisdiction of the person." And such a conclusion, in the case at bar, is to be reached without regard to the doctrine of fictional consent, which in the Neirbo case was held to embrace a waiver of venue; for here venue is present, and its waiver through such a constructive or fictional consent is not involved. In the case at bar the consent was actual and affirmative; the contract was that service of process upon the agent should give jurisdiction over the person of the corporation. So there is presented here nothing more than a matter of procedure, whereby pursuant to Rule 4(f) process was served upon petitioner's agent, and its person brought before the court.

Toland v. Sprague, 12 Peters 300, 9 L. Ed. 1093; **Munter v. Weil Corset Co.**, 261 U. S. 276, 67 L. Ed. 652; **Robertson v. Railroad Labor Board**, 268 U. S. 619, 69 L. Ed. 1119, and **Employers Reinsurance Corp. v. Bryant**, 299 U. S. 374, 81 L .Ed. 289 are cited by petitioner in support of the argument that Rule 4(f) as applied to the facts in this case extends the jurisdiction of the court. None of those cases support the asserted proposition.

In **Toland v. Sprague**, the defendant was a resident of Gibraltar, and jurisdiction of his person was sought to be had through attachment proceedings. The court held that such proceedings did not confer jurisdiction over the defendant's person, because there was no statute authorizing the same. However, the defendant appeared and it was

further held that he thereby waived jurisdiction of his person.

In **Munter v. Weil Corset Co.**, and also in **Robertson v. Railroad Labor Board**, the defendants were non-residents of the State where the suit was brought, and process was served on them beyond the boundaries of the state; and there being no statute authorizing such service, it was held that no jurisdiction was acquired over their persons.

In **Employers Reinsurance Corp. v. Bryant**, process was served on the defendant's agent in a district other than that in which the suit was brought, and the court held that this did not confer jurisdiction over the defendant's person since the statute did not authorize service of process beyond the boundaries of the district. If Rule 4(f) had been in effect when this case was decided service of process would have been valid, and jurisdiction of the defendant's person would have been had. This the petitioner concedes (Brief p. 46, 52).

Another most cogent reason why those cases have no application here is that in none of them was there involved the matter of a consent to be sued, i. e., a consent that service of process on the agent would confer personal jurisdiction over the corporation. In **Toland v. Sprague** it was held that a general appearance was a waiver of jurisdiction over the person, and, except as modified by the Rules of Civil Procedure such has always been the rule of the federal courts. How much stronger then is the case, where as here, there is an actual and affirmative consent, rather than a fictional or constructive consent, or waiver, derived from a general appearance. In **Lafayette Insurance Co. v.**

French, 18 How. 404, 15 L. Ed. 451, the court had under consideration the effect of service upon a resident agent of an insurance company, who pursuant to the provisions of the Ohio law was its agent to receive service of process in suits brought against it in the state. The court said:

> "Nor do we think the means adopted to effect this object are open to the objection that it is an attempt improperly to extend the jurisdiction of the State beyond its own limits to a person in another state."
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> . . . . . .
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> "We consider this foreign Corporation, entering into contracts made and to be performed in Ohio, was under an obligation to attend, by its duly authorized attorney, on the courts of that State, in suits founded on such contracts, whereof notice should be given by due process of law, served on the agent of the Corporation resident in Ohio, and qualified by the law of Ohio and the presumed assent of the Corporation to receive and act on such notice; that this obligation is well founded in policy and morals, and not inconsistent with any principle of public law; and that when so sued on such contract in Ohio, the Corporation was personally amendable to that jurisdiction; and we hold such a judgment, rendered after such notice, to be as valid as if the corporation had had its habitat within the State." * * * *

In recognizing the possibility of a different rule where natural persons, or corporations not complying with the State law are concerned, the court said:

"We limit our decision to the case of a Corporation acting in a state foreign to its creation, under a law of that state which recognized its existence, for the purposes of making contracts there and being sued on them, through notice to its contracting agents. The case of natural persons, and of other foreign corporations, is attended with other considerations, which might or might not distinguish it; upon this we give no opinion."

In **Pennsylvania Fire Insurance Co. v. Gold**, 243 U. S. 93, 61 L. Ed. 610, this court had under consideration the question of whether a foreign corporation doing business in a state was subject to service of process in a suit there on a cause of action arising outside of the state. The court held that jurisdiction of the defendant's person was acquired by service on its designated agent, because it had consented thereto, saying:

"The construction of the Missouri statute thus adopted hardly leaves a constitutional question open. The defendant had executed a power of attorney that made service on the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt. **New York L. E. & W. R. Co. v. Estill**, 147 U. S. 591, 37 L. Ed. 292, 13 Sup. Ct. Rep. 444. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that

length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert."

. . . . . .

"But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act."

In Pennsylvania Fire Ins. Co. v. Gold, supra, Mr. Justice Holmes cited with approval Smolik v. Philadelphia & Reading Coal & Iron Co., 222 Fed. 148 wherein Judge Learned Hand showed clearly the difference between the implied consent to be sued, which flows from a corporation's act in doing business within a state, and its express consent to be sued derived from the appointment, pursuant to the laws of the State, of a resident agent upon whom service of process might be served. In that case the suit was brought in a United States District Court in New York on a cause of action accruing in Pennsylvania, and service of process was had upon the defendant's resident agent. It was urged by defendant that, since the implied consent to be sued arising from doing business in New York did not, under decisions of this court (Simon v. Southern Railway, 236 U. S. 115, 59 L. Ed. 492, and Old Wayne Life Association v. McDonough, 203 U. S. 27, 51 L. Ed. 345) include a consent to be sued on causes of action arising out of the state, that its express consent to be sued should be limited in exactly the same way. The court held otherwise, saying:

"These two arguments, treated as mere bits of dialectic, lead to opposite results, each by unquestionable deduction, so far as I can see. One must be vicious, and the vice arises I think from confounding a legal fiction with a statement of fact. When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.

"The limits of that consent are as independent of any actual intent as the consent itself. Being a mere creature of justice it will have such consent only as justice requires; hence it may be limited, as it has been limited in **Simon v. Southern Railway**, supra, and **Old Wayne Insurance Co. v. McDonough**, supra. The actual consent in the cases at bar has no such latitudinarian possibilities; it must be measured by the proper meaning to be attributed to the words used, and where that meaning calls for wide application, such must be given. There is no reason that I can see for imposing any limitation upon the effect of section 1780 of the New York Code, and as a result I find that the consent covered such actions as these."

Other cases involving consent to be sued are: **St. Clair v. Cox**, 106 U. S. 350, 27 L. Ed. 222; **Mutual Reserve Fund v. Phelps**, 190 U. S. 147, 47 L. Ed. 937; **Hess v. Pawlowski**, 274 U. S. 352, 71 L. Ed. 1095. See also: **Ex Parte Schollenberger**, 96 U. S. 369, 24 L. Ed. 853, **Neirbo v. Bethlehem Shipbuilding Corp.**, 308 U. S. 165, 84 L. Ed. 167, and **Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.**, 309 U. S. 4, 84 L. Ed. 537 where the consent to be sued, derived from appointment of a resident agent for service of process, was extended to include a waiver of venue, as well as a consent that service on the agent would confer personal jurisdiction over the corporation.

III.

THE RESPONDENT WAS A RESIDENT OF THE NORTHERN DISTRICT OF MISSISSIPPI.

On conflicting testimony the District Court found that the respondent was a resident of the Northern District. Not only was there substantial evidence to sustain this finding of fact, but the record makes it clear that the trial courts finding on this issue was correct. The Circuit Court of Appeals so held.

This court will not disturb findings of fact made by the trial court unless they are plainly without substantial support in the evidence. **United States v. Chemical Foundation**, 272 U. S. 1, 71 L. Ed. 131; **United States v. McGowan**, 290 U. S. 592, 78 L. Ed. 522; **Alabama Power Co. v. Tekes**, 302 U. S. 464, 82 L. Ed. 374; **General Talking Picture Corp. v. Western Electric Co.**, 304 U. S. 175, 82 L. Ed. 1273.

Moreover, the finding is in accord with applicable decisions of this court, and with the applicable statute and decisions of the Supreme Court of Mississippi. **Morris v. Gilmer**, 129 U. S. 315, 32 L. Ed. 690; **District of Columbia v. Murphy**, 314 U. S. 441, 86 L. Ed. 329; **McHenry v. State**, 119 Miss. 289, 80 So. 765; **Clay v. Clay**, 134 Miss. 658, 90 So. 181; **Bilbo v. Bilbo**, 180 Miss. 536, 177 So. 722; **Smith v. Deere**, 195 Miss. 502, 16 So. (2d) 33; Mississippi Code 1942, Sec. 4055 (Appendix B, page 50 infra).

CONCLUSION

In this case venue was properly laid in the Northern District, because that was the residence of the plaintiff and jurisdiction was founded solely upon diversity of citizenship. The holding of the District Court that petitioner was a resident of the Southern District within the meaning of Sec. 52 of the Judicial Code is wholly without justification, because a corporation cannot be a resident or inhabitant of any state or district except that of its incorporation. Moreover, under the Neirbo case all requirements as to venue were waived.

Jurisdiction over the person of the petition was acquired through service of process pursuant to Rule 4(f) Rules of Civil Procedure. Neither the venue nor the jurisdiction of the court was extended by this method of service, because venue was properly laid in the Northern District, and that court had jurisdiction of the subject matter. Jurisdiction of the court means "jurisdiction of the subject matter," a meaning obviously quite different from jurisdiction of the person. Rule 4(f) merely provided a simple and convenient method whereby the person of pe-

titioner doing business in, and having a process agent within the boundaries of the state, might be brought before any federal court in the state having jurisdiction of the subject matter. Thus, construed the Rule is procedural, and does not affect substantive rights. In addition to all this, petitioner, by appointing a resident agent for service of process, expressly consented that service on that agent should give the court jurisdiction over its person.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

W. E. GORE
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RUFUS CREEKMORE

APPENDIX "A"

MISSISSIPPI CODE 1942, SEC. 5319

§5319. RESIDENT AGENT: HOW DESIGNATED.—Every domestic corporation shall maintain an office in the county of its domicile in this state, either in charge of an officer or officers of the corporation, or in charge of some persons or corporation duly designated as resident agent for the service of process by the directors (by whatever name called) of such corporation, a duly certified copy of the resolution designating such resident agent, and the written acceptance of such agency by the agent, to be filed with the secretary of state. In the event of the death, resignation or removal of such resident agent, another shall be substituted within thirty days in the same manner and accompanied by the same fee as in the former appointment; and until such substitution, or in event of the failure of a corporation to so designate and qualify a resident agent where one is required by this act, the secretary of state shall be the agent for the service of process upon such corporation without resident agent, until one shall have been designated as herein provided.

Every foreign corporation doing business in the state of Mississippi, whether it has been domesticated or simply authorized to do business within the state of Mississippi, shall file a written power of attorney designating the secretary of state or in lieu thereof an agent as above provided in this section, upon whom service of process may be had in the event of any suit against said corporation; and any foreign corporation doing business in the state of Mississippi shall file such written power of attorney before it

shall be domesticated or authorized to do business in this state, and the secretary of state shall be allowed such fees therefor as is (sic) herein provided for designating resident agents. Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state.

APPENDIX "B"

§4055. STATE OFFICERS—LEGAL RESIDENCE OF, FIXED.—All public officers of this state, who are required to, or who for official reasons, remove from the county of their actual household and residence to another county of this state for the purpose of performing the duties of their office shall be deemed in law in all respects to be householders and residents of the county from which they so remove unless such officer elects to become an actual householder and resident of the county to which he removed for official causes.